STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 24, 2003
v	No. 226735 Wayne Circuit Court
CLIFFORD BARDEN, Defendant-Appellant.	LC No. 99-000866

Before: Zahra, P.J., and Murray and Fort Hood, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of first-degree premeditated murder, MCL 750.316(1)(a), and sentenced to life imprisonment without the possibility of parole. He appeals as of right. We affirm.

Facts and Procedure

Late in the evening of December 27, 1997, defendant went to the City of Melvindale police department to report his discovery that the victim had been killed inside defendant's apartment. The victim's autopsy revealed that he suffered at least five blows to the head by a blunt object, which caused skull fractures from the top of the victim's head to the base of his skull. Expert testimony concerning blood spatter evidence inside defendant's apartment indicated that someone had killed the victim in the living room area of defendant's apartment, possibly while the victim, who had no defensive wounds, sat in a recliner that disappeared from the apartment on the day of the killing. Clothing that defendant wore on the day the victim was killed was stained by spattering of the victim's blood and tissue, indicating the presence of the clothing near the victim at the time of his death. Police discovered a garbage bag in the trash near defendant's apartment containing mail addressed to defendant, bloody towels, and two bloody arm covers from the chair that disappeared from defendant's apartment. Police also removed from the trunk of a vehicle associated with defendant two garbage bags containing clothing belonging to defendant and two bloody pillow cases.

Defendant advised the police that he did not kill the victim, whom he knew socially. The victim was staying with defendant temporarily before the victim's intended trip to Texas. According to defendant, he arrived home during the mid-afternoon of December 27, 1997, found the victim dead, and panicked by trying to clean the mess, before ultimately contacting his

attorney friend later that evening. Defendant was charged with the victim's murder in January 1999.

Analysis

I. Ineffective Assistance of Counsel

Defendant first contends that he received the ineffective assistance of counsel. Because defendant failed to timely file a motion for a new trial or evidentiary hearing to address his allegations of ineffective assistance of counsel, appellate review of this issue is limited to mistakes apparent from the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002).

To establish ineffective assistance of counsel, a defendant must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that counsel's representation so prejudiced the defendant that he was deprived of a fair trial. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994). With respect to the prejudice aspect of the test for ineffective assistance, the defendant must demonstrate the reasonable probability that but for counsel's errors the result of the proceedings would have been different, and that the attendant proceedings were fundamentally unfair and unreliable. *Id.* at 312; *People v Rodgers*, 248 Mich App 702, 714; 645 NW2d 294 (2001). The defendant must overcome the strong presumptions that his counsel rendered effective assistance and that his counsel's actions represented sound trial strategy. *Id.* at 714-715.

We find without merit defendant's first suggestion that counsel was ineffective by failing to request that the circuit court quash his bindover from district court on a charge of first-degree murder. As defendant acknowledges in his brief on appeal, defense counsel argued in closing at the preliminary examination that no evidence of premeditation or deliberation existed. Further, the evidence adduced at the preliminary examination established that the victim suffered "blunt force injuries of the head which included multiple scalp lacerations, depressed skull fractures, and basilar skull fractures, . . . [and] contusions of the left cerebral hemisphere of the brain." There was also evidence that the police found no signs of forced entry into defendant's apartment and that defendant tried to clean up the crime scene and dispose of the victim's body. This evidence supports the district court's decision to bind defendant over on a first-degree premeditated murder charge. *People v Terry*, 224 Mich App 447, 451; 569 NW2d 641 (1997); see also *People v Coy*, 243 Mich App 283, 315-316; 620 NW2d 888 (2000) (indicating that circumstances of a killing, including the absence of forced entry into a residence and the number and nature of a victim's wounds, may establish premeditation); *People v Abraham*, 234 Mich App 640, 656; 599 NW2d 736 (1999) (explaining that a defendant's conduct after a killing may prove premeditation and deliberation). Accordingly, defense counsel was not ineffective for failing to file a frivolous motion to quash the district court's bindover. *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant next argues that defense counsel inexcusably failed to call at trial two witnesses who would have raised the possibility that a man named Dennis Riashi had some inclination to harm the victim. The record reflects that defense counsel repeatedly attempted to question police officers who investigated the victim's death regarding their focus on defendant at the outset of and throughout the investigation, and that counsel elicited from the officers that

they learned of other potential suspects, including Riashi. Defense counsel also posed several questions concerning the failure by the police to interview Riashi. Defense counsel's questioning of police witnesses regarding the extent of their efforts to ascertain and pursue suspects other than defendant constituted a matter of trial strategy, which this Court will not second guess. *People v Rockey*, 237 Mich App 74, 76-77; 601 NW2d 887 (1999); *People v Rice (On Remand)*, 235 Mich App 429, 445; 597 NW2d 843 (1999).[1]

We also reject defendant's claim that defense counsel should have requested that the court instruct the jury concerning voluntary manslaughter. Because the record contains absolutely no evidence tending to establish that the victim's death occurred in the heat of passion caused by adequate provocation, defense counsel was not ineffective by failing to make a meritless request for a voluntary manslaughter charge to the jury. *People v Elkhoja*, 251 Mich App 417, 445; 651 NW2d 408, lv gtd 467 Mich 915 (2002); *Snider*, *supra*. Furthermore, this Court will not second guess defense counsel's strategic decision to argue that defendant was totally innocent and played no role in the victim's murder, consistent with defendant's statements to police. *People v LaVearn*, 448 Mich 207, 215-216; 528 NW2d 721 (1995).

II. Evidence of Defendant's Prior Incarceration

Defendant next claims that the circuit court should have ordered a mistrial because the prosecutor, contrary to his promise and the court's order, played for the jury a portion of defendant's tape-recorded statement to police that referred to his prior incarceration. We decline to address defendant's unpreserved claim of entitlement to a mistrial, in support of which defendant cites no authority whatsoever. *People v Watson*, 245 Mich App 572, 587; 629 NW2d 411 (2001); *People v Nash*, 244 Mich App 93, 96-97; 625 NW2d 87 (2000). We further note that the single, brief mention of defendant's prior incarceration, which the parties agreed occurred inadvertently, did not prejudice defendant's ability to receive a fair trial. *People v Griffin*, 235 Mich App 27, 36-37; 597 NW2d 176 (1999).

III. Undue Delay in Charging Defendant

---

[1] Moreover, defendant fails to establish that the absence at trial of testimony by the missing witnesses, an agent of the Drug Enforcement Agency and the victim's former girlfriend, deprived him of a substantial defense that would have made a difference in the outcome of the trial. *People v Kelly*, 186 Mich App 524, 526; 465 NW2d 569 (1990). The jury was apprised of a potential conflict between the victim and Riashi when the prosecutor introduced defendant's statements to the police, in which defendant suggested Riashi as a suspect. The police investigator's testimony at trial indicated that although the police did not speak with Riashi, they investigated him and ruled him out as a potential suspect. The testimony that defendant alleges his counsel overlooked, indicating the involvement of the victim and Riashi in a drug deal and that the victim owed Riashi money, would have provided only some further background detail concerning the relationship between the victim and Riashi. Besides this evidence that the victim and Riashi knew each other, defendant offers no evidence tending to suggest that, contrary to the conclusion reached by the police, Riashi in fact murdered the victim. Accordingly, we cannot conclude that the inclusion of the desired testimony would have changed the outcome of the trial, or that the exclusion of the testimony rendered defendant's trial unfair. *Rodgers*, *supra* at 714.

Defendant also raises for the first time on appeal an unpreserved argument that the approximate one-year period of delay between the victim's death and the filing of the instant murder charge deprived him of due process. *People v Davis*, 250 Mich App 357, 364; 649 NW2d 94 (2002). Defendant's claim is wholly lacking merit. Defendant makes no showing of substantial prejudice arising from the delay. He has not specifically identified any potential witness who became unavailable because of the delay, or even suggest in general terms what testimony beneficial to his case any allegedly unavailable witness might have provided. *People v White*, 208 Mich App 126, 134-135; 527 NW2d 34 (1994). While defendant questions the necessity of the delay before charging him, he likewise fails to substantiate that the prosecution intended to gain a tactical advantage in delaying this prosecution. *Id*. at 134.

IV. DNA Evidence

Defendant next challenges the trial court's admission of DNA evidence. Because defendant failed to make a timely objection to this evidence at trial, we review this issue only to determine whether any plain error occurred that affected defendant's substantial rights. *People v Pesquera*, 244 Mich App 305, 316; 625 NW2d 407 (2001); *Coy*, *supra* at 287.

Defendant initially complains that the prosecutor failed to make the required preliminary showings that the DNA testing methods employed by the police enjoyed general acceptance in the scientific community, and that the police adhered to generally accepted laboratory procedures. We find no plain error emanating from this claim. As defendant acknowledges, this Court years ago took judicial notice that both types of common scientific DNA testing methods, the polymerase chain reaction (PCR) method and the restriction fragment length polymorphisms (RFLP) method, enjoyed general acceptance within the scientific community. *Coy*, *supra* at 290-292. Defendant provides no documentation to support his suggestions that the Michigan State Police crime laboratory routinely utilizes any particular DNA testing method or that a scientific working group has criticized the methods employed by the Michigan State Police. Defendant also cites no legal authority tending to place in doubt this Court's previous acknowledgements of the generally accepted soundness of the different DNA testing methods, or in support of his argument that "the prosecutor was required to first establish that generally accepted laboratory procedures were followed." *Watson*, *supra*. Moreover, the record contains no indication which of the two DNA testing methods the police used in this case. Because defendant has failed to demonstrate plain error, we decline further consideration of his argument relating to the general acceptance of the instant DNA testing methods. *Pesquera*, *supra*; *Coy*, *supra* at 287.

With respect to defendant's argument that the prosecutor improperly introduced evidence of a DNA match without qualifying or quantifying the significance of the match, we agree that the police expert improperly offered testimony of DNA matches or consistencies without any explanation regarding the degree of certainty of her conclusions.[2] *Coy*, *supra* at 293-294, 301-303. In this case, however, the admission of the DNA match evidence without accompanying

[2] The expert testified that DNA profiles generated by testing samples from defendant's shorts revealed a DNA mixture consistent with the major DNA profile of the victim, and a minor profile of defendant. The expert further opined that DNA testing of tissue samples recovered from defendant's shorts matched the victim's DNA profile.

qualitative or quantitative interpretation did not affect the outcome of defendant's trial. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *Coy*, *supra* at 313. Whether the victim's blood and tissue appeared on defendant's clothing did not constitute a contested issue in this case. In defendant's statements to the police, he acknowledged moving the victim's body and attempting to clean his bloody apartment. During closing argument, defense counsel likewise acknowledged the presence of the victim's blood and tissue on defendant's clothes. The disputed issue concerning the victim's blood and tissue involved the manner of its arrival on defendant's clothes. The prosecutor theorized this occurred when defendant beat the victim over the head repeatedly. Defendant attributed this evidence to the fact that his clothes were lying about the apartment at the time the victim was killed and his subsequent efforts to clean the scene. The jury had the opportunity to determine what version of events it found credible and we must presume the jury rejected defendant's explanation. *Elkhoja*, *supra* at 442.

V. Due Process Issues

Defendant further asserts that the inadequate investigation of the victim's murder by the prosecutor and the police deprived him of due process. Although defendant did not preserve his constitutional claim by raising it before the trial court, this Court may review for the first time on appeal an unpreserved claim alleging a serious due process violation. *Davis*, *supra*; *People v Crear*, 242 Mich App 158, 166; 618 NW2d 91 (2000).

After reviewing defendant's various complaints, we find none of them meritorious. Defendant cites no authority for the proposition that the prosecutor or the police had a responsibility of keeping him apprised of their progress in investigating the victim's death.[3] Defendant's argument that the police did not investigate Riashi ignores the police investigator's testimony that the police investigated Riashi sufficiently to eliminate him as a suspect. Defendant offers no evidence concerning Riashi that the police in their allegedly inadequate investigation failed to uncover, and identifies specifically no further suspects that the police should have pursued. Lastly, none of the authorities cited by defendant support the proposition that the police had an affirmative duty to pinpoint the time of the victim's death.[4] Accordingly, defendant has failed to develop a valid claim of a constitutional violation arising from the investigation of the victim's murder. *Watson*, *supra*; *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (noting that a defendant cannot leave it to this Court to search for a factual basis to sustain or reject his position).

VI. Prosecutorial Misconduct

---

[3] Defendant does not assert that the police or the prosecutor failed to turn over to him any evidence that their investigation uncovered. *Watson*, *supra*.

[4] Even though defendant did not file an alibi defense, in his statement to the police he suggested that the victim was killed sometime between 9:30 a.m. and 3:00 p.m. on December 27, 1997. The statement further included defendant's assertion that he had been in Belleville during that period of time, and defendant introduced the testimony of a witness who recalled that one day directly after Christmas 1997, she observed and spoke briefly with defendant, who had arrived in Belleville and cut wood for a shed from early in the morning until approximately 5:00 p.m.

Defendant additionally claims that the prosecutor engaged in misconduct during his closing argument by shifting the burden of proof and arguing facts not in evidence. Because defendant did not object at trial to, or request a curative instruction concerning, the prosecutor's allegedly inappropriate remarks, defendant failed to preserve the alleged instances of prosecutorial misconduct. *People v Kelly*, 231 Mich App 627, 638; 588 NW2d 480 (1998). This Court reviews unpreserved claims of prosecutorial misconduct only for plain error that affected the defendant's substantial rights. *People v Schutte*, 240 Mich App 713, 720; 613 NW2d 370 (2000).

We conclude the prosecutor's remarks did not improperly shift the burden of proof to defendant. After repeatedly emphasizing during closing argument the importance of the expert testimony concerning blood spatter in proving the prosecutor's case for first-degree murder, the prosecutor stated the following:

> And you also heard that the defendant had an opportunity to have his own expert look at the evidence that we have. Because [defense counsel] said, "Well, you don't look at the evidence for civilians, you only look at it for police officers." He had an opportunity to do that. An opportunity to bring his own witness—his own expert in and look at the evidence.

The record reflects that defendant did try to raise an inference of expert bias in favor of the police by eliciting from an expert in the state police crime laboratory that she only could perform scientific testing on evidence that the police submitted to her. The prosecutor subsequently at trial inquired of the police inspector whether "defense counsel ha[d] an opportunity to bring an expert witness in to observe and test" defendant's shirt and shorts, to which the investigator responded affirmatively. Accordingly, we conclude that the prosecutor's mention of defendant's opportunity to examine the evidence represented a proper response to defendant's insinuation of police-biased test results, and a proper argument of the evidence presented at trial. *Schutte*, *supra* at 721.

Defendant next claims that the prosecutor argued facts not in evidence when he mischaracterized defendant's statement to the police. In questioning the veracity of defendant's statement to the police, the prosecutor wondered how "[defendant] immediately knew [the victim] wasn't beaten by fists" as soon as he entered his apartment and saw the victim's body. During his tape-recorded statement, defendant in fact explained his discovery of the victim's body in relevant part as follows: "[The victim] was just covered in blood. You know, it wasn't fists, obviously." While the prosecutor technically misquoted defendant, we fail to comprehend any meaningful distinction between defendant's actual statement and the statement as recalled by the prosecutor; both the prosecutor's version and defendant's actual statement conveyed defendant's immediate ascertainment that the victim had experienced injuries more severe than any possibly inflicted by fists. Accordingly, we find no prosecutorial misconduct that affected defendant's substantial rights. *Schutte*, *supra* at 720-721.

VII. Great Weight of the Evidence

Defendant lastly avers that the jury's verdict was against the great weight of the evidence. Defendant failed to preserve a challenge to the verdict as against the great weight of the evidence because he did not file a motion for new trial on this basis. *People v Winters*, 225 Mich App

718, 729; 571 NW2d 764 (1997). This Court reviews only for manifest injustice an unpreserved challenge to a verdict as against the great weight of the evidence. *People v Noble*, 238 Mich App 647, 658; 608 NW2d 123 (1999). We find no merit to defendant's claim.[5]

The victim was found in defendant's apartment, dead from at least five blows to the head by a blunt object that caused many fractures in his skull. Blood on the victim's body and blood spattering inside defendant's apartment appeared consistent with the victim being killed as he sat covered in a recliner, such as the one missing from defendant's apartment as of the day of the killing. Defendant's clothes had impact stains from the victim's blood and tissue, indicating that the clothes were nearby at the time the victim suffered the blows that killed him. In bags apparently from a package purchased early on the evening of the victim's death, which package the police found inside defendant's apartment, the police discovered bloody towels, bloody arm rest covers matching a bloody head rest cover found inside the sleeping bag containing the victim's body, bloody pillow cases, mail addressed to defendant, and the victim's address book. Evidence indicated that defendant had lied to the police about giving the victim a key to his apartment, his whereabouts on the morning and early afternoon of the victim's death, and the identity of a potential suspect in the victim's death. The multiple blows to the victim's head, the absence of defensive wounds to the victim, and defendant's actions in attempting to clean the apartment and discard evidence of the crime amply support the jury's finding of premeditation and deliberation. *Coy*, *supra* at 315-316; *Kelly*, *supra* at 642. The prosecutor need not prove defendant's motive for killing the victim. *Rice*, *supra* at 440.

The great weight of the evidence at defendant's trial did not contradict the jury's verdict. In his statement to police, defendant acknowledged trying to clean his apartment, but explained that he merely discovered the victim's body there and panicked. Defendant also introduced a witness' testimony that tended to support his recollection that he had been in Belleville on the day the victim was killed. The jury rejected defendant's explanation and evidence. This Court will not second guess the jury's determinations regarding the weight of the evidence or the credibility of witnesses. *People v Lemmon*, 456 Mich 625, 642, 647; 576 NW2d 129 (1998); *Elkhoja*, *supra* at 442, 446-448.

Affirmed.

/s/ Brian K. Zahra
/s/ Christopher M. Murray
/s/ Karen M. Fort Hood

---

[5] We also reject defendant's claim to the extent that defendant's arguments address the sufficiency of evidence supporting the jury's verdict instead of the great weight of the evidence presented during trial. Viewing the evidence in the light most favorable to the prosecution, there exists abundant evidence to support a rational jury's finding beyond any reasonable doubt that defendant committed first-degree premeditated murder of the victim. *People v Nowack*, 462 Mich 392, 399-400; 614 NW2d 78 (2000).